



SOUTHEASTERN LEGAL FOUNDATION, INC.

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August 3, 2000

Mr. John H. Thompson
Associate Director for Decennial Census
Bureau of the Census
Suitland Federal Center
Suitland and Silver Hill Roads
Building 2, Room 3586
Suitland, Maryland 20233

Re: Report of Tabulations of Population to States and Localities Pursuant to
13 U.S.C § 141(c) and Availability of Other Population Information,
65 Fed. Reg. 119 (2000)(to be codified at 15 C.F.R. pt. 101)
(proposed June 20, 2000).

Dear Mr. Thompson:

Please accept this letter as Southeastern Legal Foundation's comment regarding the promulgation of the Department of Commerce and Bureau of the Census's proposed rule: Report of Tabulations of Population to States and Localities Pursuant to 13 U.S.C § 141(c) and Availability of Other Population Information, 65 Fed. Reg. 119 (2000)(to be codified at 15 C.F.R. pt. 101)(proposed June 20, 2000). The Southeastern Legal Foundation is a non-profit public interest organization interested in the proper construction and enforcement of the laws and Constitution of the United States. The Foundation was established in Georgia for the purpose of participating in the public policy process. In addition to legislative initiatives and promulgation of programs designed to inform and educate the public, the Foundation endeavors to influence public policy through litigation. Furthermore, the Foundation is committed to guarding the integrity of the Census and redistricting processes. See Glavin v. Clinton, 525 U.S. 316 (1999)(Holding that sampled population data cannot be used in the determination of population for purposes of apportionment).

In our opinion, the proposed rule is an illegal delegation of the Secretary of Commerce's authority under 13 U.S.C. § 141(c). The proposed rule is a calculated attempt by one political appointee and his Chief Executive to bind the hands not only of future elected governments, but also of future executors of the decennial census. In that, the rule poisons the well of constitutional governance by political design and is therefore anathema to the full weight of American law and tradition.

The Census Act, 13 U.S.C. § 195, mandates that “. . . [t]he **Secretary shall**, if he considers it feasible, authorize the use of the statistical method known as ‘sampling’ in carrying out the [census].” 13 U.S.C 195(emphasis added). However, the Supreme Court determined that

sampled population data cannot be used in the determination of population for purposes of apportionment. See Glavin v. Clinton, 525 U.S. 316, 338 (1999). Similarly, the Court has upheld the Secretary's refusal to use statistically adjusted or "sampled" data in past census calculations. See Wisconsin v. City of New York, 517 U.S. 1 (1996). Emphasizing that the primary purpose of the census was to apportion political representation among the States, and recognizing that small changes in adjustment methodology would have a large impact upon apportionment, in 1990, the Secretary of Commerce decided not to statistically adjust the enumerated tabulation. Id. Upholding the Secretary's decision and denying Plaintiffs' attempts to judicially strong-arm the Secretary into using sampled data, the Supreme Court deferred to congressional intent that the final decision making authority vests in the Secretary of Commerce. Id. (So long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal representation," it is within the limits of the Constitution).

Moreover, the Secretary is charged with the duty to promulgate criteria to insure that the geographical areas for which specific tabulations of population are requested by States for redistricting purposes are insulated from partisan politics. See 13 U.S.C. § 141(c). Expressly stated by Congress, the Secretary is the final arbiter on the use of statistical sampling in calculating population in the decennial Census. Id. (In all cases [the Secretary] shall have final authority for determining the geographic form of such plan.)(emphasis added); see also 13 U.S.C. §195.

When Congress has explicitly stated its intent, as it has regarding this matter, an administrative agency must heed that intent. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 104 S.Ct. 2778 (1984); Food & Drug Admin. v. Brown & Williamson Tobacco Co., 120 S.Ct. 1291 (2000). The Supreme Court has mandated that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 104 S.Ct. 2778 at 2781. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Id. at 842, n.9. Therefore, the Commerce Department must abide by Congress's intent to confer authority to determine census methodology to the Secretary.

Additionally, it is clear that the delegation of Congressionally granted authority is proper only when the party originally granted the authority retains the power of final approval or review. See N.L.R.B. v. Duval Jewelry Company of Miami, 78 S.Ct. 1024 (1958). In Duval, the Supreme Court sustained the National Labor Relations Board's delegation of its subpoena power to a special master because the Board had retained the ability to review the master's decisions. Id. The Court emphasized, "[w]hile there is a delegation here, the ultimate decision . . . is reserved to the Board, not to a subordinate. All that the Board has delegated is the preliminary ruling on the motion to revoke." Id. at 1027. Consequently, when Congress expressly authorizes the Secretary to make decisions regarding the calculation and dissemination

of the Census, Duval requires that the Secretary retain the power to review decisions made by his subordinates. See Duval supra; see also E.E.O.C v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976)(review of delegee's decision required). Government officials are allowed to delegate responsibilities, but are never allowed to abandon those responsibilities.

Proposed Rule 101.1(a)(1) states that "the Director of the Census shall make the final determination regarding the methodology to be used in calculating the tabulations of population reported to the States and localities pursuant to 13 U.S.C. 141(c)." In addition, Section (a)(4) specifies that "[t]he determination of the Director of the Census shall not be subject to review, reconsideration, or reversal by the Secretary of Commerce." Read together, the proposed rule confers all of the Secretary of Commerce's authority under 13 U.S.C § 141(c) upon the Director of the Census. Consequently, the Director would have unfettered discretion regarding the methodology to be used in calculating population to be reported to the States, and whether to release to the States statistically adjusted tabulations. Accordingly, the Director's discretion, as conferred by the proposed rule, would include whether and to what extent "sampled" data should be used in tabulating population for State redistricting purposes, a power expressly granted to the Secretary by Congress. Consequently, the proposed rule abrogates constitutionally mandated and statutorily delegated authority on a fundamental matter of representative government, namely, how we count people in a republic.

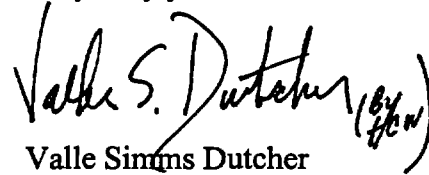
Contrary to established case law, Sections 101.1(2) and (4) of the Proposed Rule explicitly state that all of the power granted the Secretary by 13 U.S.C 141(c) will be delegated to the Director of the Census, and that the Secretary will not retain authority to review the Director's decision. Such a complete delegation of the Secretary's authority is illegal, and, as previously noted, unlawfully abrogates Congress's intent as expressed in 13 U.S.C. § 141. The rule subverts the intent of the Founding Fathers, the constitutional mandate, and the determination of the United States Supreme Court that the census count must be conducted by actual enumeration for determining congressional apportionment. Clearly, Congress granted the authority to decide whether or not and for what purposes to use sampled data to the Secretary of Commerce, not to statisticians.

In light of the aforementioned facts, the proposed amendment to 15 C.F.R. should not be promulgated. The Southeastern Legal Foundation is committed to the integrity of the Census and will utilize every available legal recourse to ensure that it is conducted in a Constitutional and lawful manner. If this rule is enacted, the Foundation will contest its enforcement through all available means.

Mr. John H. Thompson
August 2, 2000
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Thank you for your time and consideration in these matters. If there are any questions or if the Foundation can be of assistance in anyway, please feel free to contact me at anytime.

Very truly yours,

A handwritten signature in black ink that reads "Valle S. Dutcher". To the right of the signature, there is a small handwritten note in parentheses: "(by JHN)".

Valle Simms Dutcher
General Counsel
Southeastern Legal Foundation

cc: Matthew J. Glavin